1945 *Present:* **Keuneman S.P.J. and Canekeratne J.**

CARTHELIS APPUHAMY, Appellant, *and* SIRIWARDENE, *et al.*, Respondents

75—D. C. Inty. Colombo, 10,277.

Will—Probate—Power of Appeal Court to reverse trial Judge's finding on "probabilities"—Trial Judge's finding that will was "unnatural or unreasonable"—No reasons given—Misdirection.

Where the trial Judge refused to grant probate of a will on the ground that the story of the witnesses in support of the will was "irreconcilable with probabilities"—

Held, that the Court of Appeal was in as good a position to weigh the probabilities as the trial Judge.

Held, further, that the failure of the Judge to weigh or discuss the facts on which he came to the conclusion that the will was "unnatural or unreasonable" was a serious misdirection.

APPEAL from a judgment of the District Judge of Colombo. The appellant claimed probate of a will. The first respondent opposed the grant of probate. The trial Judge held that the evidence produced before him had not satisfied him that the will propounded was the act and deed of the deceased and dismissed the application of the appellant.

N. Nadarajah, K.C. (with him *N.E. Weerasooria, K.C., S.R. Wijayatilake,* and *S. P. Rajendram*), for petitioner, appellant.—This appeal raises the question of the validity of a will alleged to have been made by one Don Frederick Siriwardene. The testator excluded from the operation of his will the inherited property. Out of his acquired properties he made specific bequests to the Sailanthayatana Piriyena of Bentara and to Ananda College. He devised the remainder of his acquired property to the petitioner, Carthelis Appuhamy, an old and faithful servant, and to two of his step sisters, Cecilia and Lily. The petitioner was appointed executor.

The learned trial Judge has based his decision on probabilities. On the question whether the will is a reasonable and natural will he has followed the decision in *Rajasuriar v. Rajasuriar* [1]. The facts of that case are distinguishable. There a child of the testator was deprived of a share of the property. In the present case the testator had no children. A will natural on the face of it is presumed to be valid—*Gunasekera v. Gunasekera* [2]. The learned Judge in the present case has not conformed to what he was required to do under the Civil Procedure Code. He has not stated his reasons for his findings on the evidence—*(1932) A.I.R. (P.C.) 202 at p. 207.* A testator has a right to be capricious if he chooses. The Court cannot construct a will. With regard to the value of expert evidence see *Wakeford v. Lincoln (Bishop)* [3]; *Mendis v. Jayasuriya* [4]; *Sarkar on Evidence, 1939 ed., p. 455; Best on Evidence, p. 227.*

[1] *(1937) 39 N. L. R. 494.*
[2] *(1939) 41 N. L. R. 351.*
[3] *(1921) 90 L. J. (P.C.) 174.*
[4] *(1932) 12 C. L. Rec. 64.*

H. V. Perera, K.C. (with him *S. P. Wijewickrema* and *H. W. Jayewardene*), for first respondent.—The trial Judge admittedly did not rely on the evidence of the handwriting experts. He was not satisfied that the instrument was the act and will of the deceased. In the case of a last will where there is a contest with regard to execution the Court must be satisfied that it was the act and deed of the deceased. Regarding the principles which should guide the Court of Appeal in hearing an appeal where the matter in question is a matter of fact see Viscount Sankey's judgment in *Powell v. Streatham Manor Nursing Home* [1]. The Court of Appeal should be slow to interfere with a judgment arrived at by a Judge who both saw and heard the witnesses, unless there is a manifest error—*Tharmalingam Chetty v. Ponnambala* [2]. Regarding the value of the evidence of a handwriting expert see *Herath Singho v. Appuhami* [3]. It is submitted that no sufficient reason has been adduced for upsetting the finding of the trial Judge.

N. Nadarajah, K.C., in reply.—A judgment which does not deal with the points in issue and does not pronounce a finding definitely on them is not a judicial pronouncement, nor must a judgment be delayed for several months after the case has been closed—*Tikiri Menika v. Deonis* [6]. Where in a case involving the decision of a question of fact the Judge fails to discuss the evidence in his judgment, a Court of Appeal would be justified in interfering with the decision—*De Zoysa v. Mendis* [5]. There are limits to the rule that a trial Judge's findings of fact cannot be disturbed—*Falalloon v. Cassim* [6], *Yuill v. Yuill* [7].

Cur adv. vult.

November 22, 1945. KEUNEMAN S.P.J.—

The petitioner claimed probate of a will alleged to have been made by Don Frederick Siriwardene (hereafter referred to as the testator) on October 5, 1942. The testator died on October 12, 1942, in Colombo. He excluded from the operation of his will the properties which he had inherited from his father, and out of his acquired properties he devised specified lands to the Sailanthayatana Pirivena of Bentara and to Ananda College. The remainder of his acquired property the testator devised to the petitioner " who has been assisting me chiefly, residing in my house for about 20 years and regularly serving me obediently " and to his " two poor sisters " Cecilia Siriwardene and Lily Siriwardene in equal shares, with the proviso that " they, their children and grandchildren shall be entitled to possess the said properties ". The testator also devised his residing house to the petitioner and Cecilia Siriwardene and directed that the three beneficiaries he had named should pay Rs. 300 to the preaching hall fund of the Welagedera Vihare. The petitioner was appointed executor of the will.

The first respondent opposed the grant of probate, and the trial Judge held that the evidence produced before him had not satisfied him that

[1] *(1935) A. C. 243 at p.249.*
[2] *(1942) 23 C. L. W. 57.*
[3] *(1920) 22 N. L. R. 361.*
[4] *(1903) 7 N. L. R. 337.*
[5] *(1925) 26 N. L. R. 497.*
[6] *(1918) 20 N. L. R. 332 at p. 335.*
[7] *(1945) 29 C. L. W. 97 at p 101 ; (1945) I. A. E. R. 183*

the will propounded was the act and deed of the deceased and dismissed the application of the petitioner. From this judgment the petitioner appeals.

It was in evidence that the testator's father, Don Cornelis Siriwardene, married three times. The testator was the only child of the first marriage, and himself did not marry. The children of the second bed were the first respondent and Davith, who died leaving children, and two daughters. On the third occasion Don Cornelis married Elpi Nona who had two daughters, Cecilia and Lily Siriwardene, the devisees. But on the evidence recorded in this case it is at least doubtful whether these two can be regarded as the lawful children of Don Cornelis. The petitioner himself is not a relation of the testator and appears to have entered the house of the testator at the age of 12 in the capacity of a servant, but the petitioner stated that for 20 years he had been living with the testator and assisting him in all his personal and business affairs, including the management of his properties for a few years before the testator's death, and had become his trusted Manager and Steward. In this capacity he used to visit the deceased's estates and pay all his labourers, and was also entrusted with the control both of his domestic and his business matters.

The will was alleged to have been signed by the testator on October 5, 1942, in the presence of five witnesses, at a time when the testator was ill. The petitioner says he was unaware of the execution of the will at the time and till after the death of the testator. On October 7 the testator was removed to the General Hospital, Colombo, and on his way is said to have stayed for a short time at the Maliban Hotel in the Pettah, where John Perera was Manager.

The testator died at the General Hospital on October 12 but his death had not been anticipated earlier. The body was brought to his village. On October 13 the first respondent as next of kin arrived at the testator's house and demanded the keys, which the petitioner refused to give up except to the headman. Eventually the headman Jayanetti was brought and in his presence the petitioner locked up all the drawers and cupboards and handed the keys to him. At this stage the petitioner did not make any claim as executor under the will. There is evidence on the part of another servant of the testator, Sammy Jayasinghe, that he told the petitioner on the 13th that he was executor and devisee under a will executed by the testator. Sammy Jayasinghe is said to have been the person who took down the terms of the will from the testator and transcribed the will, and also signed as a witness.

There is a discrepancy in the evidence here, for the petitioner says that Sammy Jayasinghe only gave him this information on the 15th, though he had heard on the 13th from another witness to the will, Thomas Appuhamy, of the execution of a will. But no one appears to have informed the first respondent about the execution of the will, and the will itself was not forthcoming at this stage.

The cremation took place on October 15. A few days before October 20 the petitioner consulted Neil de Alwis, Crown Proctor of Balapitiya, about this matter, and on his advice the five witnesses to the alleged will were taken to the Proctor and swore affidavit P18 on October 20. In

P18 it was stated that a will was signed and attested by them on October 5, and the witness, Thomas Appuhamy, added that the will was taken in the testator's suitcase to Colombo when he went to enter the hospital.

Later, on November 5, an advertisement P4 was inserted in the " Daily News " offering a reward of Rs.. 50 for an " important document " lost on October 7 between Colpetty and the General Hospital. The document was said to be enclosed in a cover bearing the name of Wilson de Silva, Proctor, Kalutara. The name and address of the advertiser were not given but merely a number. A similar advertisement P5 was inserted in the " Dinamina " of November 6.

In response to this, John Perera of the Maliban Hotel, wrote P6 on November 12 to the " Dinamina " that he had the document in the envelope described and requested that the advertiser should see him. Owing to delay—which the evidence shows was attributable to the office of the " Dinamina ",—the letter of John Perera was not forwarded to the advertiser for some time. So on November 17 John Perera wrote another letter (P7) to the " Dinamina ". Eventually the petitioner met John Perera and obtained the envelope. Inside the nvelope were found the will in question, and also certain documents relating to a different matter in respect of which Proctor Wilson de Silva had obtained a legal opinion from the testator. John Perera's evidence was that on October 7 the testator had handed him the envelope to keep for him as he was going to enter hospital and would return in three or four days.

A large body of evidence was called on both sides. With regard to this evidence the trial Judge said he was " unable to refer to any particular witness and say that his evidence can be accepted as true or rejected as false ". He added that " the only witness whose looks and appearance caused a prejudice in my mind is Sammy Jayasinghe, and the only witness who impressed me as speaking nothing but the truth is Gomis. As regards the witness Jayanetti, headman of Welagedera, and Don Lewis Appuhamy, I think they cut a sorry figure under cross-examination." But he makes it clear in his next sentence that he is referring to " demeanour and deportment ", and adds " I have *therefore* to decide the case on probabilities." I think the Judge held here that he was unable to say that the evidence of any witness was true, though he was favourably impressed by the demeanour of Gomis and unfavourably by the demeanour of Sammy Jayasinghe, and probably also of headman Jayanetti and Don Lewis Appuhamy.

It has been urged by Counsel for the first respondent that the evidence of Gomis has been accepted as true and that this evidence demolishes the case of the petitioner that a will was signed on October 5. The District Judge has made it abundantly clear that he was unable to say that the evidence of any single witness " can be accepted as true " and was unable to decide the case on the oral evidence. He has certainly not regarded the evidence of Gomis as decisive of the case. I think it would be wrong on our part to hold in appeal that the evidence of Gomis destroys the story of the petitioner and his witnesses. The Judge has really decided the case on the " probabilities ", and I think it is our duty to consider the case upon that basis.

At an earlier stage of his judgment the trial Judge said—" I felt some difficulty in deciding this case and the special difficulty arose from the episode of the Maliban Hotel and the legal advice sought from Mr. N. de Alwis. I could not easily reconcile myself to the view that these villagers possessed the degree of cleverness to think out and execute a plan so elaborate and so full of circumstances as the Maliban episode and the legal advice from Mr. N. de Alwis." There is no doubt that the Judge has touched upon a very important factor in the case which may well be regarded as favouring the case for the petitioner. Unfortunately the Judge has not discussed this matter in detail, and he has not touched upon the advertisement in the papers and the two letters written by John Perera to the " Dinamina ". Possibly his language may be regarded as covering that also, but the language is not clear. In my opinion this aspect of the case should have been fully discussed and the Judge should have given us the benefit of his findings and the reasons on which they were based. All that he has done is to mention that " after much see-sawing " he settled to the view that the story of the witnesses in support of the will is " irreconcilable with probalities ", the Maliban episode " a fake ", and the legal advice from N. de Alwis " a make-believe ". In my opinion the Judge has not been helpful in assisting us to form a just appreciation of the case.

As regards the " probabilities ", the first and also the last point the Judge makes is that " None of the admitted relatives of the deceased is a beneficiary under the will " and that " The will in question is not a reasonable or natural will." There can be little doubt that these findings affected the Judge's attitude towards the case and I think they should be examined. If by these words the Judge suggested that the " admitted relatives " have been entirely cut off, that suggestion is incorrect. For the testator purports to have excluded from the operation of the will the property he inherited from his father, and this property would devolve as an intestacy on the " admitted relatives ". Perhaps the Judge was not entirely unmindful of this, as he had earlier pointed out that it was only the acquired property of the testator that had been devised to the named beneficiaries, but he said that there was no evidence in the case as to the nature and extent of the inherited property. This last comment is however not accurate, for the document P16 shows that the testator's father left to his heirs an intestate estate consisting of 31 lands which in 1923 were valued at about Rs. 10,000 and at the time of the testator's death would probably have been more valuable. On the face of the will then the testator had drawn a sharp and intelligible distinction between his inherited and his acquired property, and had contrived that the inherited property should pass to his " admitted heirs ".

The Judge has not given his reason for holding that the will was unreasonable or unnatural. It has to be remembered that the testator had left behind him no wife, no children, and no full brothers and sisters. The only " admitted heirs " were half brothers and sisters of the second bed. That the testator had a special kindness for Cecilia nd Lily there can be little doubt. Whatever their real claims to be the children of the testator's father, the testator had always recongnized them as sisters. In fact the Judge does not reject and appears to accept the evidence of

Cecilia that the testator was not on very good terms with anybody except her, her sister Lily, and the petitioner, and the Judge himself recognizes the likelihood " that the sisters were the special objects of his bounty." The documents P2, P25, P26, and P27 also show that the testator was fond of Cecilia and Lily and regarded them as sisters. Admittedly Cecilia was living with the testator for some time before his death. The petitioner said that Lily was also living with the testator. That was denied by Gomis, but another witness for the first respondent, Ameresinghe, admitted that Lily also lived with the testator for some time. In fact the first respondent himself admitted that he had stated that Lily was his sister " for the purpose of giving her in marriage ". There had been no objection to the inclusion of the names of Cecilia and Lily as heirs of the testator's father in the testamentary proceedings (P16) although the question of their descent was raised in a later partition case (P17).

There has been a considerable body of evidence as to the relations between the testator and his half brothers, the first respondent and Davith. There had been litigation between Davith and the testator in 1927 (See P3), and the petitioner alleged that the first respondent was not in the habit of visiting the testator. At the same time there was the evidence of Gomis and others that first respondent visited the testator. The Judge has not discussed this important question nor recorded his findings. I am not satisfied that the Judge gave his attention to these matters, and the failure to consider them considerably vitiates his judgment.

Let me turn to the case of the petitioner. Admittedly he was not a relation and had joined the testator as a servant at the age of twelve. But about 20 years had elapsed since that time. The billhead P1 shows that he had risen to the position of a partner whose name was included in the business name in at least one important venture by the testator. The petitioner claimed that he was also in reality the manager of all the testator's affairs and had performed genuine and valuable service on behalf of the testator. The witness Thomas Appuhamy said that the petitioner was " like an adopted son " to the testator. The trial Judge should have considered all this evidence as well as evidence to the contrary, but there is nothing to show that he was done so, and I think he has misdirected himself in this connection.

Finally there is the fact that on the face of the will the testator had provided for certain devises to charities.

All these matters which I have mentioned have a strong bearing on the question whether the will in question can be regarded as unreasonable or unnatural. I think it would be an error to suggest that the preference of a testator for persons who are on terms of friendship and cordiality, though not of relationship, over those who are to some extent connected by blood but are not on terms of intimacy can be branded as unreasonable or unnatural. On the contrary I should regard it as natural and reasonable that a testator should choose as recipients of his bounty those who are near and dear to him, whether connected by blood or otherwise, and in this respect I do not think a Sinhalese testator differs from any other testator.

I have dealt at some length on this subject because I think it shows a fundamental weakness in the judgment and because the Judge's views on this matter must inevitably have coloured his opinion on the other aspects of the case.

The other points which the Judge makes as regards " probabilities " are as follows:—

(1) He records his " conjecture " that the will was fabricated on October 11 when the petitioner returned to the village after leaving the testator in hospital. He also holds that the will could not have been fabricated after the death of the deceased. There is not an atom of evidence to support either of these points. The second point may actually be regarded as favouring the petitioner's story, and Counsel for the first respondent himself strongly attacked that finding.

(2) The Judge comments on the fact that the testator did not before the date of the execution of the will give any indication that he was going to execute a will. I do not say that this point could not be considered by the Judge but it does not appeal to me as a conclusive argument.

(3) The trial Judge said that the evidence of Peter Jayasinghe was "irreconcilable" with that of Sammy Jayasinghe, because Sammy Jayasinghe says he was called into the room by the testator and asked, whether Peter Jayasinghe and other witness had come to the house while Peter Jayasinghe says that during all that time he waited in the house of the deceased. In the first place the evidence of Peter Jayasinghe is not correctly given; what he did say was—"I waited from 1.30 till about 4.30 p.m. *Meanwhile I went to a school and came back* ". This shows that Peter Jayasinghe was not in the house all the time, and it is possible that the testator had discovered this. In the second place, even if at the most there was a discrepancy, that does not make the evidence of the two witness "irreconcilable". In fact the two witnesses corroborate each other on material points.

(4) The trial Judge says that as regards the 5th October the petitioner said he was away from home for a good part of it; he did not say that he was away from home from 10.30 A.M. to 4.30 P.M. What the petitioner actually said was—" In the morning I went out to fetch Dr. Ratnayake and returned with the doctor. Then I went back in the same car to fetch medicine and returned home about 6 p.m. I was out practically the whole day. I had also on that day to go to a boutique ". It is at least possible that the short interval during which the petitioner was in the house did not coincide with the dictation or the drafting or the singing of the will.

(5) The trial Judge says that if the testator desired secrecy as regards the will—as the witnesses assert—his object was likely to be defeated by having it witnessed by five villagers, and that he could have easily arranged for a quiet execution of the will before a notary. The testator could not easily have gone out on that day without having caused comment. To my mind it is a question whether the coming of a notary or of the five villagers to the house would have caused greater publicity, and even a notary would have needed two witnesses. I do not regard this argument as a strong or unequivocal one.

(6) The Judge says that he doubts whether the envelope containing the will was put into the suitcase; it would have been returned to Proctor Wilson de Silva at Kalutara, or at any rate the petitioner would have seen it at Colpetty when he opened the suitcase. The first point has some substance, for the testator actually met and talked to Proctor Wilson de Silva on his way to the hospital and he certainly had an opportunity to give over the envelope with his contents to the Proctor. As regards the second point, it would depend on how the bag was packed and unpacked, as to whether the petitioner would have seen the envelope—and even if he saw it he may not, if his story be true, have known what the importance of the envelope was, and may not have registered the fact of having seen the envelope in his mind.

The Judge comments on the fact that the testator kept the envelope containing the will with John Perera rather than with Proctor Wilson de Silva. As I suggested before, this is a point which was worthy of consideration, but at the same time one has to bear in mind the fact that individual testators have their idiosyncracies and that explanations which may have been available if they were alive are not obtainable after their death.

(7) The Judge also comments on the fact that no mention was made by the testator to the petitioner, who had been appointed executor, of the making of the will. Here again, this is a point worthy of consideration, but as against it one has to bear in mind the desire for secrecy spoken to by the witnesses. Further, there is the fact that the testator did not anticipate that he was going to die so soon.

(8) The trial Judge thought that the Maliban incident and the subsequent incident which led to the discovery of the will were "too good to be true". As I suggested before, this is too facile a finding, and the Judge has not thought fit to examine the whole of those events in detail and to record his reasons for the finding.

(9) The Judge comments on the fact that the petitioner had gone to Proctor N. de Alwis. He says "Galmatte is within the jurisdiction of the District Court of Kalutara, and ordinarily people of Galmatte would transact their business at Kalutara". This may be true with regard to cases instituted in the Kalutara Courts but there is nothing to show that for legal advice people of Galmatte always go to Kalutara, and there is definite evidence in this case that Proctor de Alwis's residence is much nearer to Galmatte than is Kalutara.

(10) The Judge says that the readiness with which the five witnensses appeared before Mr. de Alwis for affirming to the affidavit made him think "that they are conspirators who are prepared to colloborate to the end". All I can say is that this is a most startling assumption, and no reasons are given for it.

Further the Judge held that Lewis Appuhamy, the husband of Cecilia, was a colloborator. Not only is this not supported by any evidence but in fact Lewis was called by Counsel for the first respondent into the witness box and no suggestion whatsoever of colloboration was put to him. I think the assumption of the Judge is unwarranted.

(11) The trial Judge makes a very strong comment on the fact that the first respondent was never told shortly after the death that a will had been executed, and that his claim for the keys was not challenged. Here I think the Judge is on much stronger ground and that this is a matter which deserved the fullest consideration. This aspect of the case affects the petitioner, Sammy Jayasinghe, the headman Jayanetti, and possibly Thomas Appuhamy. One difficulty, however, is that the Judge has not really considered possible explanations. In fact throughout his judgment—although he does mention the fact that it was " after much see-sawing " that he arrived at his decision—there is hardly anything to show why the "see-saw" was necessary or what considerations really caused any judicial vacillation.

(12) The Judge has not decided the case on the expert evidence called as regards the genuineness of the signature.

I have been at great pains to consider the trial Judge's reasons because it has been strongly urged on us that we should not interfere with findings of fact by the trial Judge, and a long series of cases upon this matter decided both in Ceylon and in England have been cited to us. I may say that in this case, as I have shown earlier, we are not dealing with a finding as to the truth of oral evidence based upon observation of the manner and demeanour of witnesses, although even in such a case we are not entirely absolved from the obligation of rehearing the case: see *Yuill v. Yuill* [1] In this case the Judge has decided upon the " probabilities " of the case, and a Court of Appeal is in as good a position to weigh the probabilities as the trial Judge. On one matter, viz., whether the will can be regarded as an "unnatural or unreasonable" will—the Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference, and I think this conclusion has coloured the attitude of the Judge to the other features in the case. I think this amounts to a misdirection and a serious one. To some extent the Judge has depended on conjectures and assumptions which cannot be justified. There have been a number of points decided by the Judge on an incorrect appreciation of the evidence. For some of his findings the Judge has given no reasons or inadequate reasons. And finally, though it was obvious—and at one stage the Judge himself so felt—that there were some strong points in favour of the petitioner, the Judge has drawn a picture of the petitioner's case in unrelieved funeral colours.

In the circumstances I am unable to support the judgment of the District Judge, and I think it must be set aside. I have carefully considered what further order should be made in this matter. In my opinion it is not possible for us to enter any final order in this matter, more especially as many points of importance have not been decided by the Judge, some of which have been indicated in this order. In these circumstances I set aside the judgment and send the case back for trial *de novo*.

It may be possible by agreement of parties to make the evidence already taken evidence in the case, but I think it is desirable that each witness should at least be retendered for cross-examination so that the Judge who re-hears the case may have an opportunity of deciding on the truth

[1] *(1945) 1 A. E. R. 183. 29 C. L. W. 97*

or otherwise of the evidence given I wish to impress on the Judge that he is not to take as final any arguments on fact which may appear in this order but that he should give his consideration to all aspects of the case.

The appellant is entitled to the costs of appeal. The costs of the trial already held will be in the discretion of the Judge who retries the case.

CANEKERATNE J.—I agree.

Remitted for trial de novo.